FILED
AUG 13 1991
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(5)

No. 90-1342

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1990

IMMIGRATION AND NATURALIZATION SERVICE,
Petitioner,

VS.

JAIRO JONATHAN ELIAS-ZACARIAS,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR *AMICUS CURIAE* AMERICAN IMMIGRATION LAWYERS ASSOCIATION IN SUPPORT OF RESPONDENT

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BRIEF FOR *AMICUS CURIAE* AMERICAN IMMIGRATION LAWYERS ASSOCIATION IN SUPPORT OF RESPONDENT

INTERESTS OF AMICUS CURIAE

Amicus curiae, the American Immigration Lawyers Association (AILA), is a national organization of lawyers and law school professors who practice and teach in the fields of immigration and nationality law.[1] AILA has a direct and substantial interest in the development of immigration law and in the case before the Court. The decision in this case may have a significant impact on the interpretation and application of the Immigration and Nationality Act, as amended by the Refugee Act of 1980, directly affecting many of the AILA's members and their clients. AILA seeks to ensure that any developments in immigration law facilitate the

[1] Petitioner and respondent have consented to the filing of this brief *amicus curiae*. The letters of consent are on file with the clerk.

administration of justice and maintain the integrity of the basic structure of immigration law.

STATEMENT

Amicus curiae addresses the important legal question whether, under the circumstances of this case, the judiciary is required to defer to the executive branch's interpretation of the statutory phrase "persecution . . . on account of political opinion" in section 201(a) of the Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102, 102-03 (codified at 8 U.S.C. § 1101(a)(42)(A) (1988)). The Immigration and Naturalization Service (INS) claims that an alien threatened with death for refusing to join a revolutionary guerrilla organization cannot, without more, establish a likelihood of persecution on account of political opinion, a prerequisite for eligibility for asylum and withholding of deportation.[2] Because that interpretation was not the basis for the decision of the Board of Immigration Appeals (BIA) in this case, conflicts with other BIA decisions in a manner indicative of impermissible bias, is contrary to clear congressional intent, and is unreasonable, it is entitled to little, if any, deference.

After receiving a personal visit from armed guerrillas, respondent Jairo Jonathan Elias-Zacarias fled his native country of Guatemala and applied for asylum and withholding of deportation. *See Zacarias v. United States INS*, 921 F.2d 844 (9th Cir. 1990), *cert. granted*, 111 S. Ct. 2008 (1991). When Elias-Zacarias was 18, two guerrillas, masked and armed with machine

[2] To establish eligibility for asylum, an applicant must establish that he is a refugee as defined by § 101(a)(42) of the Immigration and Nationality Act (INA). *See* INA § 208, 8 U.S.C. § 1158 (1988). That section defines a refugee as a person who has been persecuted or who has a "well-founded fear of *persecution on account of* race, religion, nationality, membership in a particular social group, or *political opinion*." *Id.*, § 1101(a)(42)(A) (emphasis added). The same phrase is repeated in the withholding of deportation provisions. *See* INA § 243(h), 8 U.S.C. § 1253(h) (1988). The BIA's interpretation of "on account of . . . political opinion" therefore may affect eligibility for both asylum and withholding of deportation.

guns, came to his home and told him that he would join their forces.[3] When Elias-Zacarias refused, the guerrillas said they would return and that he should "think well" about his refusal. Respondent's Opposition to Petition for Writ of Certiorari 5a. Elias-Zacarias refused to join the guerrillas because "if you join the guerrillas . . . then you are against the government. You are against the government and if you join them then it is to die there. And, then the government is against you and against your family." *Id.* Fearing that the guerrillas would return and kill him if he refused to join,[4] *id.*, Elias-Zacarias fled the country, *see* Pet. App. 40a-41a.[5]

Although it found Elias-Zacarias to be a credible witness, the immigration court ruled that he failed to establish the requisite likelihood of persecution and ordered him deported to Guatemala. *See* Pet. App. 41-42a. It did not address whether the threat by the guerrillas constituted "persecution on account of . . . political opinion."

On appeal, the BIA had before it a letter from Elias-Zacarias's father stating that the guerrillas had come to his parents' home looking for him on two occasions since he fled Guatemala, *see* 921

[3] The INS claimed—in an argument that the court of appeals concluded was "wholly unwarranted speculation"—"that the guerrillas wore handkerchiefs not to conceal their faces, but 'because it might have been dusty that day.' " *Zacarias*, 921 F.2d at 852 n.8.

[4] The Department of State acknowledges that the leftist guerrillas in Guatemala engage in forced recruitment. *See* Department of State, 102d Cong., 1st Sess., *Country Reports on Human Rights Practices For 1990* 632, 639 (Joint Comm. Print 1991). The State Department also concluded that the Guatemalan government has been known to kill, torture, or "disappear" those suspected of sympathizing with the guerrillas. *Id.* at 631. The record before the immigration court included a State Department advisory letter concerning Elias-Zacarias's application noting that the guerrillas engage in forced recruitment. *See Zacarias*, 921 F.2d at 847.

[5] Zacarias explained that he did not simply move to another part of Guatemala because "if you go to another place they . . . think that you are something with the guerrillas." Pet. App. 8a.

F.2d at 852-53, yet the agency surmised that "the guerrillas [did not] harm those who refuse their invitation to join." Pet. App. 32a. On that basis, the Board found that, although the guerrillas attempted to recruit Elias-Zacarias to assist "in their attempt to violently overthrow the Guatemalan Government," he had not been threatened. *See* Pet. App. 32a-33a. The BIA did not address whether a threat by the guerrillas constituted "persecution on account of . . . political opinion."

The court of appeals reversed in part and held that the BIA's finding that Elias-Zacarias lacked a well-founded fear of persecution was not supported by substantial evidence. *See* 921 F.2d at 852. The court mentioned that the guerrillas' threat was on account of political opinion because "the person resisting forced recruitment is expressing a political opinion hostile to the persecutors and because the persecutors' motive . . . is political." *Id.* at 850 (citations omitted). The court also noted that "there was no evidence to rebut the common sense inference" that the guerrillas were politically motivated. *Id.* at 852. The INS first raised the argument that the guerrillas' threat failed to constitute "persecution on account of . . . political opinion" in an unsuccessful petition for rehearing with suggestion for rehearing *en banc* in the court of appeals.

SUMMARY OF ARGUMENT

Amicus curiae respectfully submits that, under the facts and circumstances of this case, the Court should not defer to the Executive Branch's interpretation of the Refugee Act.

The INS's interpretation is entitled to little, if any, deference because the BIA has taken completely inconsistent positions on the question whether resistance to forced recruitment constitutes persecution on account of political opinion. For example, the Board has found that resistance to recruitment into the Afghanistan army constituted persecution on account of political opinion. On the other hand, the Board has held that resistance to forced recruitment into the armed forces of the government of El Salvador, guerrillas in El Salvador, and in this case, guerrillas in Guatemala, fail to constitute persecution on account of political

opinion. As this Court repeatedly has held, *see, e.g., Pauley v. Bethenergy Mines, Inc.*, 111 S. Ct. 2524, 2535 (1991), such an inconsistency removes this case from the category of agency interpretations properly afforded deference.

The BIA's changing interpretations appear tied to whether the applicant has fled a country with a government not favored (Afghanistan) or favored (El Salvador and Guatemala) by the Executive. Although Congress intended the Refugee Act of 1980 to remove foreign policy from refugee decisionmaking, the available evidence suggests that impermissible foreign policy considerations silently influence the Executive's asylum decisions. Because the consequences of an improper denial of asylum are severe, it is of utmost importance that the arbiter of such claims be impartial. Accordingly, the appearance of bias in agency decisions, which is clearly barred by the enabling statute, indicates that deference is inappropriate.

Moreover, the inconsistency in the BIA's interpretations illustrates that the INS's interpretation is simply the litigating position of an agency, which is not entitled to the deference accorded a well-reasoned agency interpretation of a statute. The immigration court and the BIA did not rest their finding on the interpretation now pressed by the INS. Indeed, the INS did not make this argument until *after* the court of appeals ruled in Elias-Zacarias's favor.

Perhaps most importantly, the statute is not ambiguous. As in *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987), traditional tools of statutory construction answer the interpretive question posed to this Court. The plain meaning of the text of the Refugee Act compels the conclusion that resistance to forced recruitment—resistance punishable by death—by an armed guerrilla faction in a civil war constitutes "persecution on account of . . . political opinion." In addition, unlike the situation in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), there is no suggestion in the statute or in the legislative history of the Act that Congress intended to delegate policy-making authority to the Executive Branch with respect to refugee admissions. To the contrary, Congress passed the Refugee Act to restrict the Executive Branch from relying upon policy-related reasons for

denying relief to refugees. The Act specifically sought to end an era of refugee admissions based on American foreign policy. Nothing remotely suggests that Congress intended to delegate to the Executive the authority to interpret narrowly and rigidly the provisions of the Refugee Act to limit the number of persons granted relief.

Finally, even assuming that the Board's interpretation comes within the purview of *Chevron*, it still should be reversed. In light of the statute, the agency involved, and the nature of the decision, the INS's interpretation—that resistance to guerrilla recruitment by a person who seeks to remain neutral in a raging civil war is not "persecution on account of . . . political opinion"—is unreasonable. Consequently, this Court should reject the INS's interpretation.

ARGUMENT

To be eligible for asylum, the applicant must establish a well-founded fear of "persecution on account of race, religion, nationality, membership in a particular social group, or political opinion." INA § 101(a)(42)(A), 8 U.S.C. § 1101(a)(42)(A) (1988). The INS does not contest that Elias-Zacarias, who resisted forcible recruitment by guerrillas, has "a well-founded fear of physical injury or worse . . . ." Pet. Br. at 10. The INS also concedes, as it must, that the leftist guerrillas sought to conscript Elias-Zacarias to further political goals. *See* Pet. Br. at 10. Thus, the only dispute between the parties is whether a threat by an organized terrorist force bent on overthrowing a government, against someone who refuses to join its ranks, amounts to "persecution on account of . . . political opinion." The INS takes the untenable position that "the *persecutor's state of mind is determinative* of whether persecution is 'on account of' a political belief held by the victim." Pet. Br. at 9-10 (emphasis added).

I. THE BIA'S INTERPRETATION OF THE REFUGEE ACT IS NOT ENTITLED TO DEFERENCE

A. The BIA's Inconsistent Interpretations of the Statutory Language at Issue in This Case Are Entitled to Little, if Any, Deference.

This Court repeatedly has refused to defer to an agency determination that is part of an inconsistent line of decisions.[6] "As a general matter, of course, the case for judicial deference is less compelling with respect to agency positions that are inconsistent with previously held views." *Pauley v. Bethenergy Mines, Inc.*, 111 S. Ct. 2524, 2534 (1991) (citation omitted). Deference is unwarranted when, as here, the agency departs from precedent without explanation. *See Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 216-17 (1988) (Scalia, J., concurring) ("[T]he principles announced in an adjudication cannot be departed from in future adjudications without reason.").[7]

The INS alleges that, because the BIA "consistently" has concluded that forcible recruitment is not persecution on account of political opinion under the Refugee Act, the interpretation "merits deference." Pet. Br. at 24. To support this contention, the INS relies primarily on the Board's decisions in *Matter of Acosta*, 19 I. & N. Dec. 211 (BIA 1987), *modified, Matter of Mogharrabi*, 19 I. & N. Dec. 439 (BIA 1987), in which Salvadoran nationals feared persecution based on resistance to military re-

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[6] *See, e.g., Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 355 (1989); *INS v. Cardoza-Fonseca*, 480 U.S. at 446 n.30. Indeed, some of the cases cited by the INS emphasize that deference is appropriate only when the agency's interpretation has been consistent. *See, e.g., EEOC v. Associated Dry Goods Corp.*, 449 U.S. 590, 600 n.17 (1981).

[7] *See also NLRB v. United Food & Commercial Workers Union*, 484 U.S. 112, 120 n.20 (1987); *Continental Air Lines, Inc. v. Department of Transp.*, 843 F.2d 1444, 1452 (D.C. Cir. 1988) (Starr, J.); *Homemakers N. Shore, Inc. v. Bowen*, 832 F.2d 408, 412 (7th Cir. 1987) (Easterbrook, J.).

cruitment.[8] A close examination of these BIA decisions, as well as other significant opinions that the INS fails to cite, reveals that the various interpretations of "persecution on account of... political opinion" in forcible recruitment cases are fundamentally inconsistent. The Board has *never* consistently applied this, or any other standard to claims based on resistance to forcible recruitment.

1. Afghan Cases.

Matter of Salim, 18 I. & N. Dec. 311 (BIA 1982), is the first time that the BIA addressed a claim for asylum and withholding of deportation based on refusal to serve in the military.[9] Salim fled Afghanistan after refusing to join the Soviet-backed Afghan army. The evidence offered by Salim in support of his asylum claim was testimony that he refused to join the army in its war against the rebels and that he feared persecution if deported there. *See id.* at 313. Finding that the Afghan army "resorts to dragooning and forcibly impressing into its forces men and boys," the BIA granted relief to Salim. *Id.*

Under *Salim's* lenient standard, Elias-Zacarias would be eligible for relief. As in this case, the BIA did not require that Salim meet *any* of the requirements that it later enumerated in *Matter of Acosta*. The BIA specifically did not require that Salim show

[8] The INS defines the multi-part *Acosta* test as follows: "The evidence must demonstrate that (1) the alien possesses a belief or characteristic a persecutor seeks to overcome in others by means of punishment of some sort; (2) the persecutor is already aware, or could become aware, that the alien possesses this belief or characteristic; (3) the persecutor has the capability of punishing the alien; and (4) the persecutor has the inclination to punish the alien ." Pet. Br. at 24-25 (*citing Matter of Acosta*, 19 I. & N. Dec. at 226; *Matter of Mogharrabi*, 19 I. & N. Dec. at 446).

[9] *Salim*, a decision left unmentioned by the INS, is the most frequently cited BIA opinion dealing with forcible recruitment, *see, e.g., Matter of Izatula*, Interim Dec. No. 3127 (BIA Feb. 6, 1990); *Matter of Canas*, 19 I. & N. Dec. 697, 709 n.11 (BIA 1988), *rev'd, Canas-Segovia v. INS*, 902 F.2d 717 (9th Cir. 1990), and was cited in the primary case relied upon by the INS, *Matter of Acosta*, 19 I. & N. Dec. at 214.

that he possessed a political opinion at odds with the Afghan military; the Afghan army was aware of Salim's opposition; and the Afghan army had the capability or the inclination to overcome Salim by means of punishment.[10]

Similarly, in *Matter of Izatula*, Interim Dec. No. 3127 (BIA Feb. 6, 1990), the BIA, as in *Salim*, granted asylum to an Afghan who feared persecution because he did not wish to serve in the army and because he had provided "assistance" to the mujahedin. The Board ruled that Izatula was not eligible for asylum based solely for refusal to perform military service "[s]ince the Soviet forces have withdrawn from Afghanistan...." *Id.* at 4. Nevertheless, the BIA granted Izatula asylum without reference to any of the *Acosta* requirements on the grounds that the government of Afghanistan is "illegitimate" and any punishment imposed for assisting the mujahedin would be illegitimate.[11] The BIA's decision in *Izatula* makes it clear that the Board does not require asylum applicants from Afghanistan to satisfy the stringent *Acosta* requirements.

2. Salvadoran and Guatemalan Cases.

In sharp contrast to the decisions on forcible recruitment involving nationals of Afghanistan, the BIA, as *Matter of Acosta* exemplifies, has erected nearly insurmountable barriers to similar claims by persons from El Salvador and Guatemala. First, the Board rejects asylum claims based solely on an applicant's credible testimony. Second, the Board implausibly presumes that persecution by guerrilla organizations has nonpolitical motiva-

[10] In 1985, the year the BIA decided *Matter of Acosta*, the BIA again granted political asylum and withholding of deportation to Afghan nationals resisting military conscription. *See In re Noory*, File No. A24-081-415 (BIA Oct. 28, 1985); *In re Momen*, File No. A27-026-208 (BIA Oct. 10, 1985). In neither case did the BIA apply the *Acosta* four-part test to determine eligibility for asylum.

[11] The Board's explicit reliance on the "illegitimate" nature of the government of Afghanistan, of course, is nearly certain to result in ideologically tainted decision-making. *See* Aleinikoff, *The Meaning of 'Persecution' in United States Asylum Law*, 3 Int'l J. of Refugee L. 5, 17-18 (1991).

tions. Third, the Board places a heavy evidentiary burden on the applicant of establishing a political motive or intent to persecute. Finally, the Board does not distinguish between legitimate and illegitimate recruiters.

For example, in *Matter of Vigil*, 19 I. & N. Dec. 572 (BIA 1988), the Board denied a Salvadoran's asylum claim because he failed to support his claim based on resistance to forced guerrilla recruitment with a showing that physical retribution for refusing to join was triggered by his political opinions. *See id.* at 577-78 n.4. The BIA also rejected Vigil's claim that he would be persecuted if he refused to join the government army. *See id.* at 578. It held that when a "legitimate" government sanctions a person for resisting military service, it does not constitute persecution. *See id.* The Board did not consider whether punishment by the Salvadoran military, which has a questionable human rights record, constitutes a legitimate exercise of authority.

Similarly, in *Matter of Maldonado-Cruz*, 19 I. & N. Dec. 509, 511 (BIA 1988), *rev'd*, 883 F.2d 788 (9th Cir. 1989), the BIA denied asylum to a Salvadoran who had been kidnapped and forcibly recruited by leftist guerrillas and later deserted. Ignoring *Salim* and its progeny, the Board required Maldonado to overcome by a preponderance of the evidence the presumption that the guerrillas' persecution of him would be "nonpolitical" and ruled that the guerrillas' actions did not constitute persecution. *See id.* at 516.[12] The "nonpolitical motivations" presumption—not

[12] Maldonado-Cruz also claimed that forced participation in guerrilla operations would prompt government persecution on account of political opinions imputed to him. *See* 19 I. & N. Dec. at 511, 517-18. The Board held that the Salvadoran government "has a legitimate right to investigate and detain individuals suspected of aiding or being a member of [a guerrilla] organization." *Id.* at 518. The BIA never has applied that principle to the asylum claims of Afghans and Cubans. *See Matter of Sopena-Hernandez*, File No. A28-279-551 (BIA July 15, 1987) (granting withholding of deportation to Cuban who participated in organizations hostile to government); *Matter of Mohibi*, File No. A27-497-579 (BIA July 27, 1987) (granting asylum to Afghan fearing persecution due to membership in group opposed to government).

mentioned in *Acosta*—demonstrates that even *Acosta* fails to represent the BIA's consistent position on this question.

Put simply, in stark contradiction with its decisions involving asylum applicants from Afghanistan, the BIA requires Salvadorans and Guatemalans to submit evidence of their persecutors' intent or motive to persecute.

3. The Effects of the Inconsistencies.

This Court consistently has refused to defer to agency positions at odds with positions previously held by the agency. For example, in *Cardoza-Fonseca*, this Court declined to defer to the agency's position concerning the standard of proof applicable to asylum claims because of "the inconsistency of the positions the BIA has taken through the years." 480 U.S. at 446 n.30. In so doing, this Court concluded that the BIA's "long pattern of erratic treatment [in applying the standard of proof] make[s] it apparent that the BIA has not consistently agreed, and even today does not completely agree, with the INS's litigation position that the two standards are equivalent." *Id.*

The inconsistency in the BIA's treatment of asylum applicants fleeing forced recruitment warrants similar treatment. The INS takes a position before this Court that is completely at odds with the BIA decisions. It argues that "asylum eligibility under the Refugee Act does not turn on whether persecution is legitimately authorized. . . . No principled distinction can be drawn between persons recruited by guerrillas and persons conscripted by governments." Pet. Br. at 22. However, as the BIA's forcible recruitment decisions demonstrate, the agency has made precisely those types of distinctions. Because the Board has failed to apply consistent standards to applicants from different countries, this Court should not defer to the INS's current position in this case.

Moreover, deference is unwarranted for an interpretation put forward by an agency in litigation, without previously having been laid down in a form bearing the force of law. *See Bowen v. Georgetown Univ. Hosp.*, 488 U.S. at 212-13.[13] The INS has

[13] *See also Securities Indus. Ass'n v. Board of Governors of Fed. Reserve Sys.*, 468 U.S. 137, 143-44 (1984); *St. Agnes Hosp. v. Sullivan*,

failed to offer a reasoned and consistent view of the "persecution on account of . . . political opinion" language in the Refugee Act. It instead proffers an interpretation inconsistent with its view of "the same statutory provision advocated in past cases." *See id.* Neither the immigration court's nor the BIA's rulings discuss, much less set forth, a reasoned and consistent view of the statutory language in question. Indeed, the INS failed to raise the interpretation advocated in this Court until after the court of appeals panel rejected its original arguments.

The inconsistency in the INS's interpretation of the Refugee Act demonstrates that it is merely a litigating position, not a reasoned and consistent interpretation of the statute. Because the INS's litigating position amounts to nothing more than a search for some rationale to reverse the ruling in favor of Elias-Zacarias, it does not deserve deference.

B. Because the BIA's Inconsistent Interpretations of the Statute Appear To Be Influenced by Impermissible Bias, This Court Should Not Defer to the Agency Interpretation in This Case.

The Executive Branch's inconsistent interpretation of the "persecution on account of . . . political opinion" language in the Refugee Act suggests a deeper flaw in the administrative decisionmaking process. Despite similar circumstances, the BIA consistently finds that natives of Afghanistan—a country with a government at odds in recent years with the United States government—fled political persecution, while natives of El Salvador and Guatemala—countries supported by the American government—did not. The nature of the inconsistency gives rise to an inference that the INS is biased against persons fleeing countries with governments supported by the United States. The Refugee Act, however, at a minimum bars foreign policy bias from

905 F.2d 1563, 1568 (D.C. Cir. 1990); *see also Church of Scientology v. IRS*, 792 F.2d 153, 162 n.4 (D.C. Cir. 1986) (*en banc*), *aff'd*, 484 U.S. 9 (1987) (assuming that litigation position might be entitled to *Chevron* deference but concluding that "counsel's interpretation in fact does *not* explain agency action but is, to the contrary, incompatible with the agency's settled course of conduct") (emphasis in original).

influencing the determination of asylum eligibility.[14] Because the BIA's interpretation of the statute may have been influenced by bias prohibited by the statute, it is not entitled to deference.

The right to an unbiased decision-maker is essential to an impartial decision by an administrative agency.[15] When an agency appears to be impermissibly biased, careful scrutiny of the agency action, not deference, is warranted.[16] For example, in *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983), the Court reversed an agency decision made during President Reagan's administration to rescind a rule promulgated by a previous administration that would have required passive restraints in automobiles. The agency made that decision in the face of a statutory mandate to improve traffic safety. *See id.* at 33. Although the agency did not expressly rely on the administration's

[14] One of the issues before this Court in *INS v. Doherty*, 111 S. Ct. 950 (1991), is whether, *after* an applicant has established a well-founded fear of persecution on account of political opinion, *see* INA § 101(a)(42)(A), 8 U.S.C. § 1101(a)(42)(A) (1988), the agency may consider foreign policy in exercising discretion to grant or deny asylum, *see* INA § 208, 8 U.S.C. § 1158. In this case, the BIA did not deny relief based on the discretion bestowed it by statute but instead concluded that Zacarias failed to establish a well-founded fear of persecution on account of political opinion.

[15] *See, e.g., Gibson v. Berryhill*, 411 U.S. 564, 578-79 (1973); *Goldberg v. Kelly*, 397 U.S. 254, 271 (1970).

[16] *See Withrow v. Larkin*, 421 U.S. 35, 47 (1975) ("Not only is a biased decisionmaker constitutionally unacceptable but 'our system of law has always endeavored to prevent even the probability of unfairness.' ") (*quoting In re Murchison*, 349 U.S. 133, 136 (1955)); Fallon, *Of Legislative Courts, Administrative Agencies, and Article III*, 101 Harv. L. Rev. 915, 985 n.377 (1988) (stating that "court should, of course, withhold deference . . . when evidence indicates agency bias"); Breyer, *Judicial Review of Questions of Law and Policy*, 38 Admin. L. Rev. 363, 371 (1986) (suggesting that deference to agency action may depend on "whether the agency can be trusted to give a properly balanced answer" to question).

support for deregulation,[17] the Court reviewed the decision with great care. *See id.* at 40-57.

In contrast, the Environmental Protection Agency's interpretation of the statute at issue in *Chevron* did not appear to be influenced by political considerations contrary to statutory mandate. The agency interpretation did not represent a departure from that of any previous administration. *See Chevron*, 467 U.S. at 840-42, 845-59. Nor were there any facts giving rise to an inference that impermissible bias influenced the agency's interpretation. Along with other reasons, the absence of any indication of bias in the decisionmaking process in *Chevron* favored deference to the interpretation.

This case is no different in principle from *State Farm*.[18] An asylum decision influenced by impermissible factors might result in the applicant's deportation to a country to face serious deprivations of life and liberty. *See Cardoza-Fonseca*, 480 U.S. at 449.[19] Consequently, it is particularly important for the agency adjudicating an asylum claim to be truly impartial. The BIA's inconsistent interpretation of identical language in the Refugee Act apparently depends on the nationality of the asylum applicant, *see supra* Section I(A), which suggests that the agency's interpretation has been influenced by United States foreign policy. The Refugee Act, however, was designed to remove foreign policy from the executive branch's asylum determinations. Indeed, one of Congress's basic objectives was to eliminate the "discrimina-

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[17] *See generally* L. Gerston, C. Fraliegh & R. Schwab, *The Deregulated Society* (1988).

[18] For a discussion of the relevance of *State Farm* and *Chevron* to the judicial review of asylum decisions, see Johnson, *A "Hard Look" at the Executive Branch's Asylum Decisions*, 1991 Utah L. Rev. 279.

[19] *See also Reyes-Arias v. INS*, 866 F.2d 500, 504 (D.C. Cir. 1989) (Starr, J.) (describing asylum as "most sensitive of human claims in the international community"). Because of the interests at stake, Judge Friendly viewed agency decisions concerning an alien's right to remain in this country as requiring stringent procedural protections. *See* Friendly, "*Some Kind of Hearing*", 123 U. Pa. L. Rev. 1267, 1296-97 (1975).

tory treatment of refugees by providing a new definition of refugee . . . ."[20] As required by international law, the Act removed ideological and geographical limitations on refugee eligibility. *See Cardoza-Fonseca*, 480 U.S. at 434-35; *INS v. Stevic*, 467 U.S. 407, 427 (1984). To that end, the Refugee Act removed provisions from the Immigration and Nationality Act that limited eligibility for relief to those fleeing Communist or Middle Eastern countries. *See* INA § 203(a)(7)(A)(i), 8 U.S.C. § 1153(a)(7)(A)(i) (1976) (repealed by Refugee Act § 203(b), 94 Stat. 102, 107 (1980)).

Indeed, the Attorney General, the INS, and the Department of State have conceded that "the fact that an individual is from a country whose government the United States supports or with which it has favorable relations *is not relevant to the determination of whether an applicant for asylum has a well-founded fear of persecution.*" *American Baptist Churches v. Thornburgh*, 760 F. Supp. 796, 799 (N.D. Cal. 1991) (emphasis added).[21] The INS therefore cannot justify its various interpretations of "persecution on account of . . . political opinion" on the nationality of the asylum applicant.

When viewed in light of the overall pattern of the Executive Branch's asylum decisions, the appearance of foreign policy bias in this case becomes more troubling. Inconsistent interpretations

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[20] S. Rep. No. 256, 96th Cong., 1st Sess. 1 (1979); *see* H.R. Rep. No. 608, 96th Cong. 2d Sess. 13 (1979), *reprinted in* 1980 U.S. Code Cong. & Admin. News 141 (stating that, under the Refugee Act, the "plight of the refugees themselves, as opposed to national origin or political considerations, should be paramount in determining which refugees are to be admitted to the United States"); *see also* Martin, *Reforming Asylum Adjudication: On Navigating the Coast of Bohemia*, 138 U. Pa. L. Rev. 1247, 1262 n.39 (1990) ("Congress intended the refugee standards to be applied neutrally and without ideological bias.") (citations omitted).

[21] In making that concession, the Executive Branch settled a lawsuit in which a class of Salvadorans and Guatemalans claimed discriminatory treatment in the asylum process. The settlement afforded class members the opportunity to reapply for asylum. *See* 760 F. Supp. at 799.

of the Refugee Act by the BIA based on the applicant's nationality exist in a number of instances.[22] Despite the mandate of the Act, the Executive's asylum decisions correlate closely to the United States' foreign policy agenda.[23] A report of the United States General Accounting Office showed that, despite little apparent difference in country conditions, those who fled countries not on the best of terms in the early 1980s with the United States government, such as Afghanistan, China, Cuba, Poland, and Iran were granted asylum with much greater frequency than those from regimes supported by the United States, such as El Salvador, Guatemala, and Haiti. *See* United States General Accounting Office, *Asylum: Uniform Application of Standards Uncertain—Few Denied Applicants Deported*, 22, 42 (1987).[24]

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[22] *See* Note, *A Refugee By Any Other Name: An Examination of the Board of Immigration Appeals' Actions in Asylum Cases*, 75 Va. L. Rev. 681, 711-19, 712 n.145 (1989); *see also* Yarnold, *Administrative Policymaking: Adjudication by the Board of Immigration Appeals in Asylum-Related Appeals 1980-87*, 9 Pol'y Stud. Rev. 681, 686 (1990) (statistical analysis of BIA decisions concluding that "[a]liens from hostile states were more likely to prevail in asylum-related appeals to the BIA than aliens from nonhostile states").

[23] *See* N. Zucker & N. Zucker, *The Guarded Gates: The Reality of American Refugee Policy* 140-76 (1987); G. Loescher & J. Scanlan, *Calculated Kindness: Refugee and America's Half-Open Door, 1945 to the Present* (1986); Johnson, *supra*; *Note, Political Bias in United States Refugee Policy Since the Refugee Act of 1980*, 1 Geo. Immigr. L.J. 495 (1986). As former Chairman of the House Subcommittee on Immigration, Refugees and International Law Romano Mazzoli bluntly observed: "The Refugee Act of 1980 was intended to eliminate ideology and geography as the controlling factors in our refugee admission program. We seem not to have accomplished this most important objective." 131 Cong. Rec. H9308 (daily ed. Oct. 29, 1985) (letter from Romano L. Mazzoli to President Reagan dated Sept. 27, 1985).

[24] For example, the report found that, for calendar year 1984, the agency denied the asylum claims of 98% of the Salvadoran applicants compared to 51% of the Polish applicants. *See* United States General Accounting Office, *supra*, at 15-16.

The nature of the administrative system that adjudicates asylum claims further supports the inference that foreign policy enters the process. One would expect the Department of State, which may provide advisory opinions on every asylum claim, *see* 8 C.F.R. §§ 208.4(a), 208.11(a), 236.3(b) (1991),[25] to place a premium on the foreign policy impact of its opinions, *see* Martin, *supra*, at 1331-34. The General Accounting Office report showed that agency's final asylum determinations agreed with the State Department's opinion *96%* of the time. *See* United States General Accounting Office, *supra*, at 22-23.

Another clear example of the foreign policy tilt to the Executive's asylum decisions is the fluctuating treatment of Nicaraguans depending on the United States government's changing foreign policy toward the Nicaraguan government. Although the percentage of Salvadorans granted asylum remained consistently low in the 1980s as United States foreign policy toward that country remained constant, the success rate for Nicaraguan applicants varied dramatically depending on the shifting foreign policy toward Nicaragua.[26] Indeed, Attorney General Meese, as part of a diplomatic attack on the Sandinista government, directed the INS to encourage Nicaraguans to apply for asylum.[27]

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[25] The State Department letters traditionally appeared to be little more than form letters simply stating conclusions without analysis. *See, e.g., Balazoski v. INS*, 932 F.2d 638, 642-43 n.2 (7th Cir. 1991); *Montecino v. INS*, 915 F.2d 518, 521 n.1 (9th Cir. 1990).

[26] *See* H.R. Rep. No. 244, 101st Cong., 1st Sess., pt. 2, at 4 (1989). For the period June 1983 to September 1988, the INS District Directors' approval rate of asylum applications for Nicaraguans was 27.9% compared to 2-3% for Salvadoran and Guatemalans. *See Central American Asylum-Seekers: Hearing Before the Subcomm. on Immigration, Refugees and International Law of the House Comm. on the Judiciary*, 101st Cong., 1st Sess. 70 (1989). In fiscal year 1988 alone, the approval rate was 53.19 % for Nicaraguans compared to 2.79 for Salvadorans and 5% for Guatemalans. *See id.*

[27] *See* Department of Justice, Press Release (July 8, 1987), *reprinted in Central America Asylum-Seekers: Hearing Before the Subcomm. on Immigration, Refugees and International Law of the House Comm. on the Judiciary*, 101st Cong., 1st Sess. 70 (1989).

As the disparate treatment in the forcible recuitment cases suggests, foreign policy appears to have a silent influence on the BIA's asylum decisions. As the United States Court of Appeals for the Second Circuit noted in reversing the BIA's denial of asylum to a Salvadoran, "[w]hen it appears, as here, that extraneous influences—not appearing in the record—may have determined the outcome of an administrative proceeding, expending judicial effort in an attempt to analyze the record is an exercise in futility, because the administrative proceeding in such case would simply be a charade." *Melendez v. United States Dep't of Justice*, 926 F.2d 211, 219 (2d Cir. 1991).[28]

In this case, the INS's interpretation of the "on account . . . of political opinion" language of the Refugee Act appears to have been influenced by the Executive Branch's foreign policy goals. Such bias, however, is prohibited by the Refugee Act. Nothing in the Act remotely suggests that Congress sought for asylum to be another foreign policy tool for the Executive Branch. Consequently, this Court should not defer but instead should review carefully the agency's interpretation at issue in this case.[29] Elias-Zacarias, unwilling to participate with terrorists in the armed

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[28] *See M.A. v. United States INS*, 899 F.2d 304, 319 (4th Cir. 1990) (*en banc*) (Winter, J. dissenting) (noting that foreign policy "politicization of the asylum process . . . suggests that heightened deference to the Board is unwarranted"); *see also* Anker, *Determining Asylum Claims in the United States: Summary Report of an Empirical Study of the Adjudication of Asylum Claims Before the Immigration Court*, 2 Int'l J. Refugee L. 252, 235 (1990) (empirical study of two years of adjudication in immigration court concluding that "ideological preference . . . and uninvestigated political judgments . . . continue to influence the decision-making process"). For a thorough empirical study examining, among other things, ideological bias in asylum proceedings in the immigration court, see Anker, *Determining Asylum Claims in the United States: An Empirical Case Study*, 19 N.Y.U. Rev L. & Soc. Change ____ (forthcoming).

[29] Because this case involves inconsistent interpretations of a statute by the agency apparently based on the applicant's nationality, this Court need not address the question of whether all of the Executive's asylum decisions should receive careful scrutiny to guard against potential bias.

conflict in Guatemala, should not have the disposition of his asylum application subject to the vagaries of broad foreign policy concerns.

C. The Plain Meaning of the Statute Compels the Conclusion that an Individual Threatened with Violence by Leftist Guerrillas for Refusing To Join Their Ranks Has Been Persecuted on Account of Political Opinion.

The INS argues that the BIA's interpretation of "persecution on account of . . . political opinion" is entitled to deference under *Chevron*. *See* Pet. Br. at 23.[30] This Court, however, repeatedly has emphasized that courts should defer to an agency's interpretation of law only when the statute is ambiguous.[31] To determine whether the statute is ambiguous, the Court looks to traditional tools of statutory construction,[32] including " 'the particular statutory language at issue, as well as the language and design of the statute as a whole.' " *Fort Stewart Schools v. FLRA*, 110 S. Ct. 2043, 2046 (1990) (citation omitted). Because the plain meaning of the Refugee Act leads to the inexorable conclusion that a death threat by a communist military force constitutes persecution on account of political opinion, the INS's construction of the statute is not entitled to deference.

An administrative agency is bound by the "ordinary and obvious meaning" of the statutory language. *Cardoza-Fonseca*, 480 U.S. at 431 (citations omitted). The INS argues that when a

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[30] In arguing for deference to the agency's interpretation, the INS correctly does not rely upon the plenary power doctrine. This Court traditionally has applied that doctrine only to narrow the review of laws enacted by *Congress*, not legal interpretations of the *Executive*. *See, e.g., Fiallo v. Bell*, 430 U.S. 787 (1977); *The Chinese Exclusion Case*, 130 U.S. 581 (1889).

[31] *See, e.g., Sullivan v. Everhart*, 110 S. Ct. 960, 964 (1990); *K Mart Corp. v. Cartier, Inc.*, 486 U .S. 281, 291 (1988); *Chevron*, 467 U.S. at 843.

[32] *See, e.g., Pension Benefit Guar. Corp. v. LTV Corp.*, 110 S. Ct. 2668, 2677 (1990); *Cardoza-Fonseca*, 480 U.S. at 446-48; *Chevron*, 467 U .S. at 843 n.9.

politically-motivated terrorist organization persecutes an individual for refusing to join, it is not "persecution on account of . . . political opinion." *See* Pet. Br. at 9-10. The INS's sterile construction conflicts with the phrase's ordinary and obvious meaning. A personal, face-to-face threat by guerrillas armed with machine guns under any rational definition constitutes persecution on account of political opinion.

Claiming that its interpretation is entitled to deference, the INS strains to make a clear statute ambiguous. The INS argues that, because guerrillas are unconcerned with the political views of those they seek to recruit, the kidnapping or murder of those who refuse to join them fails to qualify as "persecution on account of . . . political opinion." *See* Pet. Br. at 27-30. Yet it is precisely Elias-Zacarias's refusal to join that the leftist guerrillas perceive as a political act that triggers retribution in the form of the most serious deprivations of life and liberty. Refusing to join a political organization clearly is a political choice.[33] When someone resists recruitment by a military force, that force correctly imputes a political opinion to that person.[34] For that reason, persecution by a politically motivated organization presumptively is "persecution on account of . . . political opinion." *See Platero-Cortez v. INS*,

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[33] "Just as a nation's decision to remain neutral is a political one, *see, e.g.*, Neutrality Act of 1939, 22 U.S.C. §§ 441-465 . . . , so is an individual's." *Bolanos-Hernandez v. INS*, 767 F.2d 1277, 1286 (9th Cir. 1984); *see also* Aleinikoff, *supra*, at 14 ("[P]ersons living in a war-torn nation ought to be able to decide whether to fight and which side to join, and their murder (either by guerrillas or government death squads) because of their decision to opt out is *a gross violation of human rights*.") (emphasis added).

[34] *See, e.g., Desir v. Ilchert*, 840 F.2d 723, 729 (9th Cir. 1988); *Hernandez-Ortiz v. INS*, 777 F.2d 509, 517 (9th Cir. 1985). The INS quotes a portion of the UN Handbook that supports this point. *See* Pet. Br. at 25 n.9. The Handbook states that political opinion may include one "attributed by [the persecutors] to the applicant." *See* Office of the United Nations High Commissioner For Refugees, *Handbook On Procedures And Criteria For Determining Refugee Status* ¶ 80 (Geneva 1979) (hereinafter *UN Handbook*).

804 F.2d 1127, 1131 (9th Cir. 1985). Under these circumstances, that is the only rational conclusion.[35]

Moreover, by requiring concrete evidence of a persecutor's perhaps irrational state of mind, the INS's interpretation would place a crushing evidentiary burden on asylum applicants. Asylum applicants must establish a likelihood of persecution based on events that occurred thousands of miles away with scant documentary evidence and few witnesses present in this country to corroborate their claims.[36] Evidence of the motives of terrorists is rarely available. By requiring asylum applicants to demonstrate the precise motivation of their persecutors and by creating the unfounded presumption that the violent acts of revolutionary groups do not constitute persecution on account of political opinion, the INS would place an almost insurmountable obstacle in the paths of those victimized by such lawless terrorism.[37] The INS's position would defeat the claims of those, like Elias-Zacarias, who legitimately fear serious deprivations of life and liberty because of their refusal to join terrorist organizations.[38] By

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[35] As one court of appeals observed,

> The guerrillas . . . do not inquire into the reasoning process of those who insist on remaining neutral and refuse to join their cause. They are concerned only with an act that constitutes an overt manifestation of a political opinion. Persecution because of that overt manifestation is persecution because of a political opinion.

Bolanos-Hernandez v. INS, 767 F.2d at 1287.

[36] *See UN Handbook, supra*, ¶ 95-205; Martin, *supra*, 1280-87.

[37] Consequently, the interpretation clearly conflicts with the principles that the evidentiary requirements placed on asylum applicants "should . . . not be too strictly applied" and that the applicant should receive the benefit of the doubt. *UN Handbook* ¶¶ 197, 203, at 47-48. This Court has concluded that the *UN Handbook* "provides significant guidance in construing the [relevant treaties], to which Congress sought to conform." *Cardoza-Fonseca*, 480 U.S. at 439 n.22.

[38] *See* Aleinikoff, *supra*, at 8 (stating that BIA's position in forced recruitment case of Salvadorans may require deportation to country where they are "quite likely to suffer severe harm"). Indeed, the INS itself suggests that those who fled the massive political and racial

requiring concrete evidence of the persecutor's state of mind, the agency's interpretation is at odds with this Court's suggestion in *Cardoza-Fonseca* that a mere ten percent chance of persecution might satisfy the well-founded fear standard. See *Cardoza-Fonseca*, 480 U.S. at 431, 440.

The INS supports its novel legal interpretation by selective citation to legislative history that suggests that Congress did not intend the Refugee Act to provide relief to "displaced persons." *See* Pet. Br. at 17-19. However, Elias-Zacarias is not simply a "displaced person" fleeing a civil war. Rather, he received a direct threat from masked guerrillas armed with machine guns.

This case in many ways resembles *INS v. Cardoza-Fonseca*. As in that case, the interpretive question before this Court is "well within the province of the judiciary." 480 U.S. at 448. "The judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent." *Id.* at 446-48; *see Japan Whaling Ass'n v. American Cetacean Soc'y*, 478 U.S. 221, 230 (1986) (reviewing agency interpretation as "a purely legal question of statutory interpretation"). Relying upon the statutory language, the legislative history, and the relevant treaties, the Court in *Cardoza-Fonseca* found "these ordinary canons of statutory construction compelling." 480 U.S. at 449. The Court therefore declined to defer to the INS's interpretation.

As in *Cardoza-Fonseca*, this Court consistently has rejected agency interpretations contrary to the mandate of Congress.[39] The Court should do the same in this case. Because the ordinary and obvious meaning of the statute is contrary to the INS's interpretation, it does not fall within the ambit of *Chevron*.[40]

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persecution of Idi Amin in Uganda would not have been eligible for asylum under its interpretation of the statute. *See* Pet. Br. at 19 n.6.

[39] *See, e.g., Dole v. United Steelworkers*, 110 S. Ct. 929, 938 (1990); *Sullivan v. Zebley*, 110 S. Ct. 885, 894-97 (1990).

[40] The Eleventh Circuit, in a *per curiam* opinion, *Perlera-Escobar v. Executive Office for Immigration*, 894 F.2d 1292 (11th Cir. 1990) (*per curiam*), improperly deferred to the BIA's conclusion that the guerrillas' threats against a deserter were insufficient to constitute persecution on

D. Because Congress Unambiguously Intended to Limit the Policy-Making Authority of the Executive Branch with Respect to Determining Eligibility for Asylum, the INS's Policy Justifications for Its Interpretation Must Be Rejected.

Chevron deference allows Congress to delegate policy decisions to administrative agencies with the expertise to best make the necessary judgments. *See Pauley*, 111 S. Ct. at 4782 (*citing* Sunstein, *Law and Administration After Chevron*, 90 Colum. L. Rev. 2071, 2085-88 (1990)).[41] However, "[a] precondition to deference under *Chevron* is a congressional delegation of administrative authority." *Adams Fruit Co., Inc. v. Barrett*, 110 S. Ct. 1384, 1390 (1990).[42] Conversely, when Congress chooses not to delegate policymaking authority to an administrative agency, the courts should not defer to an attempt by the agency to usurp such authority. The legislative history of the Refugee Act is clear that Congress passed the Act to *limit* the policymaking authority of the Executive Branch with respect to asylum determinations. Because the INS's interpretation therefore is based on an imper-

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account of political opinion. The court deferred without examining the statutory language or legislative history, without discussing the Board's inconsistent positions, without considering possible bias, and without examining whether the Board's interpretation was reasonable. What is more, it expressed confusion over the proper standard of review. *See id.* at 1296 ("Where the resolution of this matter involves a question of statutory interpretation, we review the BIA's decision *de novo*. We are also obliged, however, to defer to the BIA's interpretation of the applicable statute if that interpretation is reasonable.") (citations omitted).

[41] *Chevron* itself involved the highly technical issue of whether states could treat an industrial grouping as a single "stationary source" under the Clean Air Act Amendments of 1977. *See Chevron*, 467 U.S. at 840; *see also* Sunstein, *supra*, at 2096 ("[I]t is difficult to quarrel with the proposition that courts should defer when, and only when, agencies have a comparative advantage.").

[42] *See Pauley*, 111 S. Ct. at 2534; *EEOC v. Arabian American Oil Co.*, 111 S. Ct. 1227, 1235 (1991); *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. at 208.

missible usurpation of policymaking authority, it is entitled to little, if any, deference.

In stark contrast to the cases in which this Court ordinarily employs *Chevron* deference,[43] Congress passed the Refugee Act to limit the policymaking authority of the Executive in refugee matters. Until Congress passed the Act, the United States had no formal procedure for granting asylum and the Executive Branch had near complete discretion over the refugee admission. *See generally* Anker & Posner, *The Forty Year Crisis: A Legislative History of the Refugee Act of 1980,* 19 San Diego L. Rev. 9 (1981). The Executive's refugee admissions followed a clear pattern. Refugees from countries perceived as hostile to the United States, particularly those who fled communist nations, were admitted much more frequently than refugees fleeing persecution in countries with governments on good terms with the United States government. *See* Anker & Posner, *supra,* at 16-20; Helton, *Political Asylum Under the 1980 Refugee Act: An Unfulfilled Promise,* 17 U. Mich. J.L. Ref. 243, 246 (1984).

To implement the treaty obligations of the United States,[44] Congress passed the Refugee Act, which sharply curtailed the executive branch's discretion, removed foreign policy considera-

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[43] *See, e.g., Fort Stewart Schools v. FLRA,* 110 S. Ct. at 2043 (statute delegating authority to establish policies and provide guidance); *Sullivan v. Everhart,* 110 S. Ct. at 963 (statute delegating authority to promulgate regulations establishing procedures to implement statute).

[44] In 1968, the United States acceded to the United Nations Protocol Relating to the Status of Refugees, 19 U.S.T. 6223, T.I.A.S. No. 6577, 606 U.N.T.S. 267 (1967) (hereinafter "UN Protocol"), defining "refugee" in nonideological terms and obligating the United States to implement its refugee policy without regard to political considerations. Article 3 of the United Nations Convention Relating to the Status of Refugees, 19 U.S.T. 6259, 189 U.N.T.S. 137 (1951) (hereinafter "UN Convention"), incorporated into the UN Protocol in Article I(10), requires that "Contracting States . . . apply the provisions of this Convention to refugees without discrimination as to race, religion or *country of origin.*" (emphasis added). Article 3 was so central that, unlike other provisions, nations could not ratify the treaty with reservation to that provision. *See* U.N. Convention Art. 42; U.N. Protocol Art. VII(1).

tions from refugee admissions, and provided congressional control over the asylum process. Congress intended to leave no gap for agency policymaking in its definition of refugee. The term "refugee" is clearly defined by the statute in an ideologically and geographically neutral fashion. *See* INA § 101(a)(42)(A), 8 U.S.C. § 1101(a)(42)(A). That definition of "refugee" requires no specialized, technical knowledge, only a respect for ordinary principles of statutory construction, well within the competence of the courts. Consequently, this Court has carefully reviewed the BIA's interpretation of the Refugee Act. *See Cardoza-Fonseca,* 480 U.S. at 421.

The Refugee Act sought to exert congressional control over the asylum process in a number of other ways as well. Congress required the Attorney General to establish a standard, uniform procedure for applying for asylum. *See* INA § 208(a), 8 U.S.C. § 1158(a) (1988). Congress also required annual consultation between the President and Congress on refugee admission quotas and emergency refugee initiatives. *See* INA § 207, 8 U.S.C. § 1157. Finally, Congress amended the withholding of deportation provision to make relief mandatory when the applicant has established a clear probability of persecution. *See* INA § 243(h), 8 U.S.C. § 1253(h); *INS v. Stevic,* 467 U.S. at 421-25.

In short, Congress passed the Refugee Act to limit the executive branch's ability to weigh policy concerns and to ensure that refugees were to be treated in a fair and ideologically neutral manner. To read the statute as granting policymaking authority and requiring deference to the BIA's interpretation of the statutory definition of refugee is to disregard clear congressional intent.

Nonetheless, the INS asks this Court to allow it to interpret the statute to further policy considerations not permitted by Congress. The INS in effect admits that it proffers a narrow construction of the "persecution on account of . . . political opinion" language because it fears a "flood" of asylum claims. *See* Pet. App. 20. Congress, however, did not provide that such a policy consideration might be weighed in determining whether an asylum applicant established a well-founded fear of persecution on account of political opinion. Nor did Congress explicitly or implicitly delegate the authority to the agency to weigh such policy concerns. As

in *Cardoza-Fonseca*, the INS seeks to stringently limit the number of persons eligible for asylum.[45] The Refugee Act, however, simply does not allow such policy considerations to influence the determination of refugee eligibility.

When logically carried forward, the INS's interpretation has some startling ramifications. Few would suggest that, assuming the Refugee Act was law during the time of Nazi Germany, the flight of millions of Jews from the horrors of a Holocaust would entitle the INS to narrowly define "refugee" so that few Jews could qualify for relief. Such broad-based policy judgments affecting the *lives* of persons were precisely what Congress hoped to end by passing the Refugee Act.[46]

II. IN ANY EVENT, THE BIA'S INTERPRETATION OF THE STATUTORY LANGUAGE IN QUESTION IS UNREASONABLE

Assuming *arguendo* that the INS surmounts the many formidable barriers to *Chevron* deference, the BIA's interpretation must still be "based on a permissible construction of the statute." *Chevron*, 467 U.S. at 843. A court may not substitute its construction of a statutory provision for a reasonable interpretation made by the agency. *See Chevron*, 467 U.S. at 844. Assuming that the Refugee Act implicitly delegates power to the INS to interpret the "persecution on account of . . . political opinion" language, this Court still must determine whether the agency's interpretation is reasonable. *See* Diver, *Statutory Interpretation in*

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[45] *See Cardoza-Fonseca*, 480 U.S. at 452 (Blackmun, J., concurring) ("The efforts [of the lower courts in interpreting the Refugee Act] stand in stark contrast to—but, it is sad to say, alone cannot make up for —the years of seemingly purposeful blindness by the INS, which only now begins its task of developing the standard entrusted to its care").

[46] The legislative history of the Refugee Act states that it was "consistent with this country's traditions of welcoming the oppressed of other nations and with our obligations under international law. . . ." H.R. Rep. No. 608, 96th Cong., 2d Sess. at 17-18. Congress intended the Refugee Act to effectuate the "historic policy of the United States to respond to the urgent needs of persons subject to persecution in their homelands." Pub. L. No. 96-212, § 101(a), 94 Stat. 102 (1980).

the Administrative State, 133 U. Pa. L. Rev. 549, 569 (1988) ("Courts retain the authority to control administrative abuses of power; deferential review simply recasts the question of law as whether the agency's interpretation is 'reasonable.' ") (citation omitted).

To determine whether the agency's interpretation is reasonable, the court first must consider "the language, policies and legislative history of the Act. . . ." *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 131 (1985).[47] To be reasonable, the agency interpretation must not be "contrary to clear congressional intent," *Chevron*, 467 U.S. at 843 n.9, as revealed by "the legislative history or the purpose and structure of the statute," *Chemical Mfrs. Ass'n v. Natural Resources Defense Council, Inc.*, 470 U.S. 116, 126 (1985).[48]

In this case, the text, structure, purpose, and legislative history of the Refugee Act would be frustrated by the INS's unreasonable interpretation of the "persecution on account of . . . political opinion" language.[49] The INS's unduly stringent interpretation of

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[47] *See also NLRB v. United Food & Commercial Workers Union*, 484 U.S. at 123 (suggesting that "reasonable" interpretation is one that is "rational and consistent with the statute"); *Continental Air Lines*, 843 F.2d at 1449 (Starr, J.) ("[R]easonableness in this context is to be determined by reference both to the agency's textual analysis (broadly defined, including where appropriate resort to legislative history) and to the compatibility of that inquiry with the Congressional purposes informing the measure."). *See generally* Anthony, *Which Agency Interpretations Should Bind Citizens and the Courts?*, 7 Yale J. on Reg. 1, 27-30 (1990).

[48] *See, e.g., FAIC Sec., Inc. v. United States*, 768 F.2d 352, 363-64 (D.C. Cir. 1985) (holding that agency interpretation was unreasonable as contrary to statutory purposes).

[49] *See* Sunstein, *Constitutionalism After the New Deal*, 101 Harv. L. Rev. 421 (1987) (arguing that, in deciding on proper standard of judicial review, court should consider statute, agency, and nature of decision); Johnson, *supra* (arguing that statute, agency, and nature of Branch decision warrant "hard look" review of the Executive's asylum decisions).

the "on account of . . . political opinion" language in effect would mean that, unless able to perform the virtually impossible by verifying the precise motive of their persecutors, all people fleeing forced conscription by totalitarian revolutionaries in countries supported by the United States government are *per se* ineligible for asylum. *See supra* Section I(A). The meaning of the statute is clear and the INS's position is unreasonable. *See supra* Section I(C).

Moreover, by passing the Refugee Act, Congress clearly intended to eliminate ideological and geographical restrictions on asylum and to treat refugees in a humanitarian fashion. *See supra* Section I(B), (D). To that end, Congress created the statutory right to apply for asylum, bound the Executive to the well-founded fear of persecution standard, and transformed withholding of deportation from a discretionary to a mandatory form of relief. *See id.* Applying lenient standards to nationals of Afghanistan, but requiring asylum applicants from El Salvador and Guatemala to meet a heavy evidentiary burden—by offering proof of the intent and motive of their persecutors—is contrary to each of those changes in the law.

In addition, the variations in the agency's interpretations of the same statutory language illustrates the unreasonableness of the INS's interpretation in this case. The only colorable explanation for the INS's radically inconsistent interpretations appears to be the nationality of the applicant. *See supra* Section I(B). That bias, which appears to rest on the foreign policy implications of granting asylum to an applicant from a country allied with the United States, violates a central tenet of the Refugee Act.

Agency interpretations must be the product of reasoned decisionmaking, including an explanation of its reasoning, to be deemed reasonable.[50] In this case, the immigration court and the BIA did not even rest their decisions on the "persecution on

[50] *See State Farm*, 463 U.S. at 57 ("[A]n agency changing its course must supply a reasoned analysis. . . .") (citation omitted); *SEC v. Chenery Corp.*, 318 U.S. 80, 94 (1943) ("[T]he orderly functioning of the process of review requires that the grounds upon which the administrative agency acted be clearly disclosed and adequately sustained").

account of . . . political opinion" language in the Refugee Act, much less adopt the interpretation that the INS now urges upon this Court. *See supra* I(A). This falls far short of reasoned decisionmaking. *See Bowen*, 488 U.S. at 213.

A final factor for consideration in evaluating the reasonableness of the agency's interpretation is the nature of the decision. Without question, the Executive Branch's asylum decisions implicate important life and liberty interests. As this Court has observed: "Deportation is always a harsh measure; it is all the more replete with danger when the alien makes a claim that he or she will be subject to death or persecution if forced to return to his or her home country."[51] Because the INS's narrow interpretation would make it impossible for many who legitimately fear serious deprivations of life and liberty to establish eligibility for asylum, it is not reasonable. Indeed, it is contrary to "the longstanding principle of construing any lingering ambiguities in deportation statutes in favor of the alien." *Cardoza-Fonseca*, 480 U.S. at 449 (*citing INS v. Errico*, 385 U.S. 214, 225 (1966); *Costello v. INS*, 376 U.S. 120, 128 (1964); *Fong Haw Tan v. Phelan*, 333 U.S. 6, 10 (1948)).

[51] *Cardoza-Fonseca*, 480 U.S. at 449; *see also Fong Haw Tan v. Phelan*, 333 U.S. 6, 10 (1948) ("[D]eportation is a drastic measure and at times the equivalent of banishment or exile.") (citation omitted); *Bridges v. Wixon*, 326 U.S. 135, 147 (1945) ("[D]eportation may result in the loss 'of all that makes life worth living.' ") (citation omitted).

CONCLUSION

For the foregoing reasons, *Amicus Curiae* American Immigration Lawyers Association respectfully submits that the decision of the Court of Appeals should be affirmed.

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August 14, 1991